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No. 6761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

TAYLOR ROBINSON,

Petitioner

vs.

HONORABLE BAILEY BROWN, JUDGE,
United States District Court for the
Western District of Tennessee,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

W. M. SHAW,
Counsel for Petitioner

October 1963.

LECOMTE, SHREVEPORT, LOUISIANA

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United States District Court for the
Western District of Tennessee,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment rendered by the United States Court of Appeals for the Sixth Circuit in the above-entitled case on July 31, 1963.

CITATIONS TO OPINIONS BELOW

The order of the District Court is unreported and is Appendix "B" hereto, infra, p. 4a. The opinion of the Circuit Court of Appeals printed in Appendix "B" hereto, infra, p. 4a, is unreported. The order of the Circuit Court of Appeals denying a stay of proceedings pending the ap-

plication for a writ of certiorari is unreported and is printed in Appendix "B" hereto, infra, p. 6a

JURISDICTION

The order of the Circuit Court of Appeals dismissing petitioner's application for a writ of mandamus was entered on July 31, 1963. The order of the Circuit Court of Appeals denying petitioner's application for a stay of proceedings pending the outcome of this application for a writ of certiorari was issued September 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether an action for a judgment declaring that defendants have denied plaintiffs' civil rights under 42 U.S.C. 1983 involves both legal and equitable issues and, thus, gives defendant a right to trial by jury on the disputed issues at law.

STATUTES INVOLVED

The statutory provisions involved are as follows:

1) The Seventh Amendment to the Constitution to the United States.

2) The Declaratory Judgments Act, 28 U.S.C. §2201 and §2202.

3) The Civil Rights Act, 42 U.S.C., §1981 and §1983.

4) 28 U.S.C., §1333 and §1343.

They are set forth on Appendix "A", infra, pp. 1a-3a.

STATEMENT

On January 8, 1963, a suit was filed in United States District Court for the Western District of Tennessee, Eastern Division, by Brenda Kay Monroe, an infant, through William Monroe, her father and next friend, and other negro citizens of the locality, against the Board of Commissioners of the City of Jackson, Tennessee, constituting the Board of Education of said city, the County Board of Education of Madison County, Tennessee, and a large number of individual defendants, including your petitioner, TAYLOR ROBINSON. A copy of the petition in said suit is set forth as Appendix "C" hereof, and that case is hereinafter referred to as "Monroe". The petition demanded (1) a declaratory judgment decreeing that the defendants, and each of them, had violated the plaintiffs' civil rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Title 42, United States Code, §1981 and §1983, and (2) injunctive relief from the alleged racial discrimination complained of, by the issuance of a temporary restraining order, preliminary injunction and permanent injunction.

The County Board of Education of Madison County, Tennessee, and the seven (7) individual members thereof named as defendants filed answers to the complaint as amended denying the alleged discriminations and demanding a trial by jury on the legal issues presented by plaintiffs' request for a judgment declaring that defendants had denied them their civil rights as guaranteed by 42 U.S.C. 1983. Defendant TAYLOR ROBINSON, an individual member of the said County Board of Education,

filed a separate answer demanding trial by jury on the issues at law, a copy of which is set forth as Appendix "D", infra, pp. 38a - 42a.

The case was regularly set for trial on the merits for Wednesday, June 26, 1963, and all counsel of record were so notified by the Clerk of the District Court.

A number of pending motions, as well as the question of defendants' right to trial by jury on the legal issues, were taken up on June 1, 1963, at Memphis, Tennessee. At this hearing, by consent of all parties, plaintiffs moved orally to strike the demand for a trial by jury as contained in the answers of the County Board of Education of Madison County, Tennessee, and defendant TAYLOR ROBINSON. The Court, after hearing oral argument and considering the written briefs previously filed, ordered that the demand for trial by jury contained in these answers be striken and that a trial by jury be denied as to any of the issues involved. See Appendix "B", pp. 4a - 5a.

At the time of said ruling and in open Court, petitioner TAYLOR ROBINSON, through his attorney of record, notified the Court of his intention to apply to the Honorable, the United States Court of Appeals for the Sixth Circuit for a writ of mandamus to vacate and expunge from the record the order striking defendant ROBINSON'S demand for trial by jury.

On June 10, 1963, defendant ROBINSON applied to the United States Court of Appeals for the Sixth Circuit for such a writ. In this application, petitioner also asked

the Court to stay further proceedings pending a decision on the application.

The Sixth Circuit Court of Appeals entered an order directing the respondent the Honorable Bailey Brown, to show cause on or before July 10, 1963, why the petition for mandamus should not be granted, and staying further proceedings in the District Court. This order was issued June 25, 1963.

Meanwhile, on June 14, 1963, a hearing was held in Jackson, Tennessee, on a motion filed by the plaintiffs in Monroe, which asked for summary judgment against the Board of Commissioners of the City of Jackson, Tennessee, and the Board of Education of Madison County, Tennessee, to require them to submit plans for desegregation of the school systems administered by each, and an order was entered granting the same. Petitioner TAYLOR ROBINSON was represented at that hearing, and colloquy between his counsel and the respondent Judge made clear that the summary judgment applied only to the defendant Boards and not to any of the individual defendants. The summary judgment, as subsequently reduced to writing, is set forth herein as Appendix "B", pp. 10a - 12a.

The United States Court of Appeals for the Sixth Circuit handed down an opinion on July 31, 1963, dismissing the petition for a writ of mandamus. (Appendix "B", pp. 6a - 8a.) Petitioner ROBINSON immediately applied to the Sixth Circuit Court of Appeals for an order staying further proceedings in this matter pending

a timely application to this Honorable Court for a writ of certiorari to review the order dismissing his application for mandamus. On September 19, 1963, an order was issued by the Sixth Circuit Court of Appeals denying this application for a stay.

REASONS FOR GRANTING WRIT

1.

This case presents substantially the same issue that was decided by this Court in *Beacon Theatres, Inc. vs. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.(2) 988 (1955); *Dairy Queen, Inc. vs. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.(2) 44 (1962), and *Simler vs. Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed. 691 (1963). The Court is here called upon to determine whether the Seventh Amendment guarantees the right of trial by jury in a declaratory judgment action based upon statutes which provide both legal and equitable remedies. Inasmuch as the procedure followed in this case was precisely the same as that followed by the applicants for writs in *Beacon* and *Dairy Queen*, it is submitted that certiorari is the proper remedy and should be granted if applicant's complaint is meritorious.

2.

It would seem clear that in order to determine whether or not a jury trial should have been granted, all that should have been considered was the complaint filed in the District Court and applicant's answer. The complaint characterized the nature of the action and the

answer disclosed that applicant timely asserted his right to a trial by jury. What happened subsequently, may or may not have affected the posture of the case, but it could not alter its essential nature.

An analysis of the complaint shows that:

1) Paragraph 1(a) invoked the jurisdiction of the District Court under 28 U.S.C. §1331, which provides for actions arising under the Constitution and laws of the United States in which the complainant suffers damages in excess of Ten Thousand Dollars ($10,000.00). This statute provides penalties against complainants in the event they recover less than Ten Thousand Dollars ($10,000.00).

2) Paragraph 1(b) invoked the jurisdiction of the District Court under 28 U.S.C. §1343, which covers actions for damages or equitable relief where civil rights have been denied.

3) Paragraph 1(b) also states that this action is brought pursuant to 42 U.S.C. §1983, which declares that every person who under color of any statute or custom of a state has deprived another person of any of his rights or privileges secured by the Constitution "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4) Paragraph 2 asserts that this is a proceeding for a declaratory judgment for the purpose of determining an actual controversy between the parties, to-wit: whether defendants, acting under the color of certain Tennessee statutes and customs, denied plaintiffs' rights guar-

anteed by the Fourteenth Amendment to the Constitution.

5. After designating applicant TAYLOR ROBINSON as an individual defendant in Paragraph 5, it is declared in Paragraph 5(d) that applicant and the other named individuals were being sued not only in their official capacities, but also as individuals.

6. Paragraph 11 sets forth that the complained of discrimination has damaged petitioners (a) by forcing them to attend schools remote from their homes, (b) by psychological injury to their egos, (c) by requiring them to attend substandard, inadequate and poorly equipped schools, and (d) by denying them the right to attend the only technological school in the county.

7. The second paragraph of the prayer of the complaint asks the Court to adjudge and decree the rights and legal relations of the parties to the subject matter in controversy "in order that such declarations shall have the force and effect of a final judgment or decree". The next paragraph asks the Court to declare that defendants had denied plaintiffs rights guaranteed by the Fourteenth Amendment to the Constitution.

8. The final paragraph of the prayer asks the Court to grant such "other or additional relief as may appear proper to the Court to be equitable and just."

In addition, the petitioners sought several types of equitable relief, including restraining orders, temporary

injunctions, permanent injunctions, and orders for the presentation of plans for desegregation. Thus, it is clear that the plaintiffs in this petition combined both legal and equitable issues and joined the administrative bodies of two separate school systems as well as numerous individuals involved in their administration. The Federal Rules provide for such a board and comprehensive approach to legal disputes. Applicant recognized this and did not contest the comprehensiveness of the relief sought.

In his separate answer to this complaint, applicant denies substantially all of the allegations of the complaint which allege damages or injuries to the complainants and, requested a trial by jury on these disputed issues of fact.

The decision of the District Court striking applicant's demand for trial by jury and the refusal of the Court of Appeals for the Sixth Circuit to grant mandamus are believed to be erroneous and in conflict with the holding of this Court in *Beacon, Dairy Queen, Inc.* and *Simler*. It certainly cannot be squared with the opinion of the Court of Appeals for the Fifth Circuit in *Thermal-Stitch, Inc. vs. Chemi-Chord Processing Corp., etc.*, 294 F(2) 486 (1961) which stated:

> "It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theaters. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theaters, as we construe it."
> (294 F(2) 491.)

Incidentally, the above-quoted language was cited by this Court with approval as Footnote 8 of its opinion in *Dairy Queen, Inc.*

3.

In striking applicant's demand for a trial by jury, respondent sought to mitigate the harshness of this order by declaring that any decision subsequently rendered in this matter would not be res judicata, or act as collateral estoppel in the event of a subsequent demand for damages. Such a declaration, however well intended, is ineffective. This was pointed out in American Law Reports, Second Series, Vol. 10, page 784, as follows:

> "The American Law Institute, Restatement, Judgments, in Comment b to §77 points out that the res judicata effect of a declaratory judgment depends upon the scope of the declaration of rights made by the judgment, that, as to matters declared by the judgment, the parties are precluded from relitigating them, and as to matters not declared by the judgment, the parties are not so precluded, although a declaration might have been made as to such matters.
>
> "In an action for a declaratory judgment the parties cannot stipulate that the judgment to be entered upon their stipulation shall not be res judicata."
>
> (10 ALR 2d 784.)

Similarly, the scope of such a declaratory judgment was indicated in the opinion in *Thermo-Stitch, Inc.*, thusly:

> "The Court pointed out that the Declaratory Judgment Act (28 U.S.C.A. §§2201, 2202; F.R Civ. P

> 57), while allowing prospective defendants to sue to establish their non-liability, preserves a right to a jury trial for both parties. It might even be argued, although the Court did not make such an argument, that declaratory relief in itself would be adequate since the effect of a declaratory judgment for purposes of res judicata would seem to be as great as the effect of a judgment on the counterclaim."
>
> (294 F.(2) 489, Footnote 9.)

The respondent's action in trying to limit the effect of his order points up the essence of this dispute. Applicant contends that under the petition, the plaintiffs, if they could produce proper evidence, would be entitled to a judgment declaring that applicant had denied them their civil rights and was liable for all damages resulting to plaintiffs. The respondent held that the petition covered only equitable relief and that any declaratory judgment rendered thereunder would not limit defendant if damages were later sought by way of a separate action or further relief. It is submitted that a reading of the petition and the statute upon which it is based, will clearly show that the respondent was wrong. Respondent and the learned Judges of the Court of Appeals fell into the same error. They assumed that because this was an action to vindicate plaintiffs' civil rights, all of the remedies sought, would, by tradition, be equitable. That is the theme which ran through the opinions of both Courts. However, the cases show that equitable remedies are by no means the exclusive relief traditionally sought in civil rights cases. As a matter of fact, in many cases, demands for equitable

relief are coupled with demands for damages in a straight equity-law situation. A few such cases are:

> HENRY vs. GODSELL, et al, 165 F.Supp. 87 (E.D.Mich. 1958);
>
> STARLING vs. BOARD OF EDUCATION OF COUNTY OF MINGO, et al, 175 F.Supp. 703 (S.D.W.Va. 1959);
>
> EASTERLY, et al vs. DEMPSTER, et al, 112 F.Supp. 214 (E.D.Penn. 1953).

Again, there are cases in which the sole relief sought was legal. Applicant is certain that this Court is well aware of the historical course of such litigation and that both equity and law have been used independently or together in many such cases.

It is quite significant that counsel for plaintiffs though seeming to agree with the respondent's assertion that all relief sought was equitable, have never offered to stipulate to this effect nor have they amended their pleadings to limit the scope of the demand set forth. Thus, if a declaratory judgment is entered in plaintiffs' favor, plaintiffs will not even have to institute a new suit, but can immediately demand damages as further or supplemental relief. That was the procedure followed in *Security Insurance Company of New Haven vs. Gertrude June White*, Executrix, et al, 236 F(2) 215 (Cit.App. 10th, 1956), wherein the Court said:

> "[This] was a statutory action under the Declaratory Judgment Act, as amended, 62 Stat. 964, 63 Stat. 105, 28 U.S.C.A. §2201, 2202. Under §1 of

such act, a district court of the United States may upon the filing of an appropriate pleading declare the legal relations of interested parties, and the declaration entered has the force and effect of a final judgment or decree. And by §2, the court may grant further or necessary relief based upon a declaratory judgment, after notice and hearing. It is not the primary function of a court in a declaratory judgment proceeding to award damages. But the grant of power contained in §2 of the act is broad enough to vest the court with jurisdiction to award damages where it is necessary or proper to effect relief based upon the declaratory judgment rendered in the proceedings. Texasteel Manufacturing Co. v. Seaboard Surety Co., 5 Cir., 158 F.2d. 90, certiorari denied, 331 U.S. 82, 67 S.Ct. 1350, 91 L.Ed. 1843; Goldsmith Metal Lath Co. v. Milcor Steel Co., D.C., 53 F.Supp. 778; Standard Accident Ins. Co. of Detroit v. Hull, D.C., 91 F.Supp. 65. In this case, the court made and filed findings of fact and conclusions of law determining and adjudicating all issues of the case except that of damages for expenses incurred by the appellee Gertrude June White, executrix. But no formal judgment was entered at that time. Following an interim of several days, the case came on for further consideration. All parties were present and participated . . . . The court then heard evidence relating to the question of damages and announced the award . . . the entry of such judgment satisfied the requirements of the statute in "respect to procedure."

(236 F(2) 220.)

A similar procedure was followed in *Marks Music Corp. vs. Harris Pub. Co.*, 255 F(2) 518 (1958).

4.

While applicant's petition for mandamus was pending in the Sixth Circuit Court of Appeals, the respondent issued summary judgment in favor of the plaintiffs and against the two defendant school boards ordering them to present plans for desegregation of their respective systems. At that hearing, it was agreed by respondent, attorneys for plaintiffs and attorneys for applicant that this summary judgment would not mention any of the individual defendants, especially applicant TAYLOR ROBINSON. The judgment, as subsequently signed, was vaguely worded. However, as stated in the opinion of the Court of Appeals, it did not cover applicant. (Appendix "B", infra, p. 7a) Nevertheless, respondent contended, and the Court of Appeals agreed, that the effect of this summary judgment was to make the application for mandamus moot.

It is submitted that that Court erred in accepting this argument of respondent for two reasons:

1) The summary judgment was not rendered against applicant, or any of the individual defendants; did not cover the essential facts involved in the claim for damages covered by this petition; was based upon admissions by defendant Boards in their answer and the testimony of their employees; and was not based upon any admission by applicant or any testimony which specified that applicant was guilty of any of the acts complained of.

2) Since respondent contended and the Court of Appeals found that the only issues involved

were equitable issues, it is difficult to understand how a summary judgment thereon would make the legal issues moot.

There is a basic fallacy underlying the claim that the application for mandamus had become moot. Simply put — if both legal and equitable issues were involved, then any decision which was strictly limited to equitable issues could not affect a demand for trial by jury. The respondent insisted throughout that he was deciding only equitable issues. On the other hand, if there were no legal issues involved, then there was no basis for issuance of mandamus and, hence, a claim of mootness would be irrelevant. Hence, it would seem that this argument was a classical example of "begging the question".

Moreover, by agreement of all concerned, the summary judgment did not apply to applicant. As was pointed out to the Court of Appeals, it might well be that the two Boards, as legal entities, had violated plaintiffs' civil rights. However, this would not mean that each individual member of each Board had done so. Certainly, any number less than a majority might be completely innocent of a Board action taken by the majority. As was pointed out in the District Court, there is not one shred of evidence, not one admission, not one witness' testimony, which would establish that applicant, TAYLOR ROBINSON, had been guilty of any of the acts complained of. That was why no summary judgment was rendered against him and that is why the judgment, as rendered, could not legally affect his application for mandamus.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

W. M. SHAW

Counsel for petitioner

October, 1963.

APPENDIX A

STATUTES INVOLVED

* * *

SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Amendment VII — Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

* * *

UNITED STATES CODE ANNOTATED

Title 28 — Judiciary and Judicial Procedure

Declaratory Judgments

Section 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reas-

onable notice and hearing, against any adverse party whose rights have been determined by such judgment.

* * *

UNITED STATES CODE ANNOTATED

Title 42 — The Public Health and Welfare

Civil Rights

Section 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1983. Civil action for deprivation or rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

UNITED STATES CODE ANNOTATED

Title 28 — Judiciary and Judicial Procedure

Section 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant be may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

Section 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for legal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

Civil Action No. 1327

BRENDA KAY MONROE, ETC., ET AL
VS.
BOARD OF COMMISSIONERS OF THE CITY OF
JACKSON, TENNESSEE, ETC., ET AL

ORDER

This cause was heard the 1st day of June, 1963, before the Honorable Bailey Brown, United States District Judge, upon the entire record and especially upon the motion for leave to intervene with accompanying intervenor's answer and supporting memorandum filed by Charles Hardee II, et al, the motion to dismiss for failure to join indispensable parties as prayed in the answer filed by the defendant, Taylor Robinson, individually, the application for jury trial contained in the answers filed by the defendants, County Board of Education, etc., et al, and the defendant, Taylor Robinson, individually, and motion of the plaintiffs to strike said applications for jury trial, the motion of the defendants, County Board of Education, etc., et al, for a severance, and upon the statements, arguments and memoranda of law by counsel for the parties and for the proposed intervenors, from a consideration of all of which the Court finds, holds and DECREES as follows:

1. The motion for leave to intervene filed by Charles Hardee II, et al, should be and the same is hereby denied.

2. The motion to dismiss for failure to join indispensable parties, as prayed in the answer filed by the defendant, Taylor Robinson, should be and the same is hereby denied.

3. The applications of defendants, County Board of Education, etc., et al, and defendant, Taylor Robinson, individually, for jury trial should be and the same are hereby denied, and the motion of plaintiffs to strike said applications for jury trial contained in the answers of said defendants, should be and the same is hereby granted, for the reason that all issues in the case are equitable, and further, for the reason that any factual determinations made in this suit for declaratory judgment or for injunction would not be res judicata as to any later claim for damages by these plaintiffs or other plaintiffs of the same class suing for damages under the law.

4. The motion for severance filed by the defendants, County Board of Education, etc., et al, should be and the same is hereby taken under advisement for determination by the Court at a later date whether or not separate hearings are in the interest of justice and sound judicial administration.

BAILEY BROWN
UNITED STATES DISTRICT COURT

No. 15431

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAYLOR ROBINSON,

Petitioner

v.

HONORABLE BAILEY BROWN, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE,

Respondent

ON PETITION FOR WRIT OF MANDAMUS

Decided July 31, 1963.

Before: MILLER, WEICK, and O'SULLIVAN, Circuit Judges.

PER CURIAM. Petitioner prays for a Writ of Mandamus requiring the District Court to vacate and expunge from the record its order of June 1, 1963 striking his demand for a jury trial in the case of *Brenda K. Monroe, et al., v. Board of Commissioners of the City of Jackson, Tennessee, et al.*, Civil Action No. 1327 pending in the United States District Court for the Western District of Tennessee, Eastern Division.

The *Monroe* case was a class suit brought by negro school children to enjoin the City and County Boards of Education and the individual members thereof from re-

fusing to admit them to public schools on account of their race and directing the Boards to reorganize the public school on a non-racial basis. Petitioner is a Board member and was a party defendant individually. The prayer of the complaint included a request for a declaration of the rights of the parties under the Declaratory Judgments statute 28 U.S.C. §§ 2201, 2202.

After the filing of the Mandamus action in this Court, namely, on June 19, 1963 the District Judge granted plaintiff's motion for summary judgment in the *Monroe* case against the two Boards of Education which required them to file, with the Clerk of the District Court within specified periods of time, complete plans for desegregation and elimination of racial discrimination in the public school system and fixed dates for the hearing on said plans. No order was entered against the individual defendants including the Board member Taylor Robinson.

It is Mr. Robinson's contention that because the complaint in the *Monroe* case invoked the Declaratory Judgments statute the District Court was empowered to render a judgment against him individually for damages and, therefore, he was entitled to a trial by jury of the factual issues in the case. He relies on *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 and *Dairy Queen v. Wood*, 369 U.S. 469.

An examination of the complaint reveals that *Monroe* is a typical desegregation case. The prayer of the complaint is only for equitable relief. No judgment for money or accounting was requested. The inclusion of a claim for declaration of rights in the complaint did not,

in our opinion, convert an equity case into an action at law. We regard the complaint as asking merely for a declaration of rights with respect to the equitable issues. No legal issues were made either by the complaint or the answers filed by the defendants. In our judgment, it would be necessary to amend the complaint before the District Court could entertain a claim for damages. 28 U.S.C. § 2202.

The cases relied upon by petitioner are not in point. In *Beacon Theaters, Inc.*, supra, a suit for declaratory judgment and injunction was brought in anticipation of a suit by defendant for treble damages under the Sherman and Clayton Acts. The defendant filed a counterclaim and cross-claim for damages. The District Judge undertook to determine so-called equitable issues first even though the gist of defendant's claim was for damages. This operated to deprive defendant of his right to a jury trial. *Dairy Queen* was an action for infringement of a trademark in which the complaint contained a prayer for accounting. The Supreme Court construed the prayer as requesting a money judgment. The present case unlike *Beacon Theaters, Inc.* and *Dairy Queen* involves only equitable issues in which no money judgment was prayed for.

However, even though petitioner was entitled to a jury trial in the present case, if there was no genuine issue as to any material fact, the moving party would be entitled to summary judgment. Rule 56(c), Federal Rules of Civil Procedure.

We think that by reason of the summary judgment the issues in this Mandamus case have become moot. Petitioner's remedy is to appeal from the judgment.

The petition for a Writ of Mandamus is dismissed.

No. 15,431

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed Sept. 19, 1963

TAYLOR ROBINSON,

Petitioner

vs.

HONORABLE BAILEY BROWN, JUDGE,
United States District Court for the Western District
of Tennessee,

: Respondent.

ORDER

Before: MILLER, WEICK and O'SULLIVAN, Circuit Judges.

Upon consideration of the motion to stay proceedings in the District Court pending the filing and determination of the petition for Writ of Certiorari, and the response thereto,

IT IS ORDERED that said motion to stay be and it is hereby denied.

s Paul C. Weick

United States Circuit Judge

15431

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

Civil Rights Action No. 1327

Filed June 19, 1963

BRENDA KAY MONROE, ETC., ET AL
VS
BOARD OF COMMISSIONERS OF THE CITY
OF JACKSON, TENNESSEE, ETC., ET AL

ORDER

This cause was heard the 14th day of June, 1963, before the Honorable Bailey Brown, United States District Judge, upon the motion for summary judgment filed by the plaintiffs, the transcript of evidence heretofore introduced in this cause on 19 January 1963 and 15 February 1963 which has been filed as a part of the record, the brief filed by plaintiffs in support of said motion for summary judgment, and upon the statements, admissions and arguments by counsel for the respective parties, from a consideration of all of which the Court finds, holds, and DECREES as follows:

1. The motion of plaintiffs for summary judgment should be and the same is hereby granted; but the present relief awarded to plaintiffs will be in the form of a requirement that the defendants City Board of Commissioners, etc., et al., and County Board of Education,

etc., et al., file with the Court plans for desegregation of and elimination of racial discrimination in the respective school systems of the City of Jackson and County of Madison within the time and in the manner provided hereinafter.

2. The defendants, City Board of Commissioners, etc., et al., will file with the Clerk of this Court not later than 20 July 1963 a complete plan for desegregation of and elimination of racial discrimination in the school system of the City of Jackson, Tennessee. The plaintiffs are allowed to and including 27 July 1963 within which to file specifications of objection, if any, to said desegregation plan; and a hearing will be held on said plan filed by the City Board of Commissioners, before this Court in Memphis, Tennessee, at 10:00 A.M. on Tuesday, 6 August 1963.

3. The defendants, County Board of Education, etc., et al, will file with the Clerk of this Court not later than 15 July 1963 a complete plan for desegregation of and elimination of racial discrimination in the school system of Madison County, Tennessee. The plaintiffs are allowed to an including 22 July 1963 within which to file specifications of objection, if any, to said desegregation plan, and a hearing will be held on said plan filed by the said County Board of Education, before this Court in

Memphis, Tennessee, at 10:00 A.M. on Friday 26 July 1963.

s Bailey Brown
UNITED STATES DISTRICT JUDGE

Approved for Entry:

Z. ALEXANDER LOOBY and
AVON N. WILLIAMS, JR.
J. EMMETT BALLARD
JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III

By s/ Avon N. Williams, Jr.
Avon N. Williams, Jr.

Attorney for Defendants, Board of Commissioners, etc. et al.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

BRENDA KAY MONROE, an infant, by William Monroe, her father and next friend,

HAROLD DWAYNE WALKER, an infant by Frank Walker and Mrs. Rolean Walker, his father and mother and next friends,

GEORGIA STEPHANIE SPRINGFIELD, an infant, by Mrs. Mildred T. Springfield, her mother and next friend,

MARIA BONITA MARTIN, an infant, by Kenneth A. Martin and Mrs. Eva M. Martin, her father and mother and next friend, and

WILLIAM MONROE,
FRANK WALKER,
MRS. ROLEAN WALKER,
MRS. MILDRED T. SPRINGFIELD,
KENNETH A. MARTIN,
MRS. EVA M. MARTIN,

Plaintiffs

VS. CIVIL ACTION No. 1327

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, CONSTITUTING THE BOARD OF EDUCATION OR SCHOOL COMMISSIONERS OF SAID CITY, and QUINTON D. EDMONDS, R. L. PATEY, and R. E. BAILEY, Board Members or Com-

missioners, who together as such, comprise the Board of Commissioners of the City of Jackson, Tennessee, constituting the Board of Education or School Commissioners of said City;

C. J. HUCKABA, City School Superintendent and/or Superintendent of Public Instruction of the City of Jackson, Tennessee;

COUNTY BOARD OF EDUCATION OF MADISON COUNTY, TENNESSEE, and R. E. ROOKS, L. T. GREER, J. D. LILLARD, NEIL SMITH, R. D. PEARSON, JIMMY C. BOND, and TAYLOR ROBINSON, Board Members, who together, as such constitute the County Board of Education of Madison County, Tennessee; and

JAMES L. WALKER, County School Superintendent and/or Superintendent of Public Instruction of Madison County, Tennessee,

Defendants

COMPLAINT

1. (a) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331, as this action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, and Title 42, United States Code, Section 1981. The matter in controversy, exclusive of interest and costs, exceeds the sum or value of Ten Thousand ($10,000.00) Dollars.

(b) The jurisdiction of this Court is further invoked under Title 28, United States Code, Section 1343, in that:

This action is authorized by Title 42, United States Code, Section 1983, to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment, Section 1, of the Constitution of the United States and secured by Title 42, United States Code, Section 1981, providing for the equal rights of citizens and of all persons within the jurisdiction of the United States.

2. This action is a proceeding under Title 28, United States Code, Sections 2201 and 2202 for a judgment declaring the rights and other legal relations of plaintiffs and all other persons, similarly situated, eligible to attend public schools owned, maintained and operated by the City Board of Education or School Commissioners of the City of Jackson, Tennessee and or the County Board of Education of Madison County, Tennessee, in and for said City, County and State, and demanding an injunction, for the purpose of determining and redressing questions and matters of actual controversy between the parties, to-wit:

(a) Whether the custom, policy, practice or usage of the defendants in concluding plaintiffs and othe persons, similarly situated, from public schools owned, maintained and operated by the City Board of Education or School Commissioners of Jackson, Tennessee and by the County Board of Education of Madison County, Tennessee, in and for said City of Jackson and County of Madison,

State of Tennessee, and in requiring Negro school children residing in said City and County, to attend racially segregated schools operated by said City or County Boards of Education, or any other agency, public or private, solely because of their race or color, and in operating compulsory racially segregated school systems in and for said City of Jackson and County of Madison, pursuant to Sections 49-3701, 49-3702 and 49-3703, (Tennessee Code Annotated, 1955), and that portion of Section 12 of Article 11 of the Tennessee Constitution which makes it unlawful for white and colored persons to attend the same school, and pursuant to any other law, custom, policy, practice, or usage, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

3. Plaintiffs bring this action pursuant to Rule 23, (a) (3) of the Federal Rules of Civil Procedure as a class action for themselves and on behalf of all other persons similarly situated, who are so numerous as to make it impracticable to bring them all before the Court, and who seek a common relief based upon common questions of law and fact.

4. Plaintiffs are Negroes and are citizens of the United States and of the City of Jackson, County of Madison and State of Tennessee. All adult plaintiffs are parents and or guardians of the infant plaintiffs, and reside with the infant plaintiffs in the City of Jackson, and within the County of Madison, State of Tennessee. The infant plaintiffs are school children, eligible to attend the public schools of the City of Jackson and County of

Madison, State of Tennessee, and have been attending said schools and can satisfy all requirements for admission to the public schools maintained and operated by the defendant, City Board of Education or School Commissioners of the City of Jackson, Tennessee in and for said city, and by the defendant, County Board of Education of Madison County, Tennessee in and for said County, including the schools to which they respectively applied as hereinafter shown.

(5) (a) The defendant, Board of Commissioners of the City of Jackson, Tennessee constitutes the City Board of Education or School Commissioners of said City and is composed of the following Board Members or Commissioners: the defendants, Quinton D. Edmonds, R. L. Patey and R. E. Bailey, who together comprise the Board of Commissioners of Jackson, Tennessee constituting the City Board of Education or School Commissioners of said City and who are hereinbefore and hereinafter referred to as defendant, City Board of Education.

(b) The defendant, County Board of Education of Madison County, Tennessee is composed of the following Board Members: The defendants, R. E. Rooks, L. T. Greer, J. D. Lillard, Neil Smith, R. D. Pearson, Jimmy C. Bond, and Taylor Robinson, who together constitute the County Board of Education of Madison County, Tennessee and who are hereinafter referred to as defendant, County Board of Education.

(c) Both of said defendants, City Board of Education and County Board of Education, exist pursuant

to the Constitution and laws of the State of Tennessee as administrative departments or agencies of the State of Tennessee, discharging governmental functions and are by law, bodies corporate or continuous bodies or entities, and are being sued herein as such corporate or continuous bodies or entities.

(d) All of said defendants, above named as Board Members or Commissioners of the defendant, City Board of Education, and as Board Members of the defendant, County Board of Education, are citizens and residents of the State of Tennessee, and are being sued herein in their official capacities as such Board Members or Commissioners, and also are being sued herein as individuals.

(e) Defendant, C. J. Huckaba, is Superintendent of the City Schools of Jackson, Tennessee, and defendant, James L. Walker, is Superintendent of the Public Schools of Madison County, Tennessee. Both of said defendants hold office pursuant to the Constitution and laws of the State of Tennessee as administrative officers of the free public school systems of Tennessee. They are citizens and residents of the State of Tennessee and are made defendants herein and sued in their respective official capacities as stated hereinabove and also are being sued herein respectively as individuals.

6. The State of Tennessee has declared public education a State function. The Constitution of Tennessee, Article 11, Section 12, provides:

> "Knowledge, learning, and virtue, being essential to the preservation of republican institutions, and the

diffusion of the opportunities and advantages of education throughout the different portions of the State being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this Government, to cherish literature and science."

Pursuant to this mandate the Legislature of Tennessee has established a uniform system of free public education in the State of Tennessee according to a plan set out in the Tennessee Code Annotated, 1955, Sections 49-101 through 49-3806, and supplements and amendments thereto. The establishment, maintenance and administration of the public school system of Tennessee is vested in a Commissioner of Education, a State Board of Education, County Superintendents of Public Schools, and County and City Boards of Education.

7. The public schools of the City of Jackson, Tennessee are under control and supervision of defendant, City Board of Education, and defendant, C. J. Huckaba, acting as an administrative department, division or agency, and as an agent of the State of Tennessee. The public schools of Madison County, Tennessee, are under the control and supervision of defendant, County Board of Education and defendant, James L. Walker, acting as an administrative department, division or agency and as an agent of the State of Tennessee. Said City and County Boards of Education are respectively charged and vested with the administration, management, government, supervision, control and conduct of public schools within said City of Jackson and County of Madison, respectively, and are

vested with all powers and duties pertaining to, connected with, or in any manner incident to the proper conduct and control of the public schools of said City and County, respectively. Said City and County Boards of Education are under a duty to enforce the school laws of the State of Tennessee, to maintain efficient public school systems in the City of Jackson and in Madison County, Tennessee, respectively; to determine the studies to be pursued, the methods of teaching, and to establish such schools as may be necessary for the completeness and efficiency of said respective school systems. Defendant, C. J. Huckaba, as Superintendent of Jackson City Schools, and defendant, James L. Walker, as Superintendent of the Madison County Schools, respectively, have the immediate control of the operation of the public schools of said City and County, and are the respective administrative agents for the defendants, City Board of Education and County Board of Education.

8. Plaintiffs allege that the defendant, City Board of Education and its Superintendent, C. J. Huckaba, acting under color of the laws of the State of Tennessee and County of Madison, have pursued and are presently pursuing a policy, custom, practice and usage of operating a compulsory racially segregated school system in and for the City of Jackson, Tennessee. Likewise the defendants, County Board of Education and its Superintendent, James L. Walker, acting under color of the laws of the State of Tennessee and County of Madison, also have pursued and are presently pursuing a policy of operating a compulsory racially segregated school system in and for the

County of Madison, State of Tennessee. The racially segregated school systems respectively operated by defendants, consist of "primary" systems of public schools limited to and or designated for attendance by white children residing within the boundaries of said City of Jackson, and or the County of Madison, respectively. Said schools are staffed by white teachers, white principals and white sustaining personnel. Said "white" schools are located in various parts of the City of Jackson and Madison County, respectively, and regardless of location, these schools are and have been designated as "white" schools and, with certain exceptions hereinafter mentioned, may be attended by white children only. Likewise said defendants, City Board of Education and County Board of Education, respectively maintain "secondary" systems of "colored" or "Negro" schools designated as such by defendants, and limited to attendance by Negro children. These school systems are respectively staffed by entirely Negro personnel; the teachers are all Negroes, the principals and all sustaining personnel are Negroes. These schools, regardless of location, are limited to attendance by Negro children. These compulsory racially segregated school systems operated respectively by the defendants, City Board of Education and County Board of Education are based solely upon race and color; attendance at the various schools is solely based on race and color and the assignment of personnel is determined solely upon the race and color of the children attending the particular school and the race and color of the personnel to be assinged. Plaintiffs are informed and believe and therefore aver

upon said information and belief that the defendants have not maintained geographical zone lines. However, the schools in said "Negro" and "white" systems are and have been designated and maintained by defendants exclusively on the basis of race and color and assignments of students to these schools are and have been made by the defendants on the basis of the designation and past use of a school as a "Negro" or "white" school and the race or color of the pupil to be assigned, all white children being mandatorily assigned to the "white" schools and all Negro children being mandatorily assigned to the "Negro" schools. For many years, both the defendants, City Board of Education and County Board of Education, have respectively adopted, maintained and enforced and they still are respectively maintaining and enforcing this custom, policy, practice or usage of compulsory racially segregated systems in the schools of said City and County over which said defendants respectively have jurisdiction and control, pursuant to which they have required and are still requiring all Negro children, including the infant plaintiffs, to be assigned to said schools designated exclusively for Negro children.

9. From time to time since 1954 or 1955, Negro citizens and residents of the City of Jackson and County of Madison have requested the defendants to cease operating said compulsory racially segregated public school systems in and for the City of Jackson and County of Madison, State of Tennessee, and to comply with the decision of the Supreme Court of the United States in the Segregation Cases; and also for several years defendants have

been fully aware of their affirmative duty under the decisions of said Court to desegregate all public facilitiees under their jurisdiction and control. Defendants have continued, however, to operate said compulsory racially segregated public school systems in said City and County and have failed and refused to formulate or adopt any plan for desegregating same.

10. In August, 1961 several Negro children residing in Jackson, Tennessee made application to the defendant, City Board of Education, for admission to "white" schools. Said defendant treated these as applications for transfer, and in January, 1962, granted the applications of three of said Negro children for "transfer" to a single "white" school, simultaneously issuing the following official statement which was published in the Jackson Sun, a local newspaper, on the 25th day of January, 1962:

> "In compliance with the decree of the United States Supreme Court in the case of Brown vs. School Board, and the decrees of the United States District Court for the Western District of Tennessee, interpreting and implementing the decree of the Supreme Court in the Brown case, the Board of Commissioners (school board) of the City of Jackson, Tennessee, by unanimous decision pursuant to Tennessee's Pupil Placement Act, approves these applications effective today."

Thereafter said defendant continued and still continues to treat all applications of Negro school children for admission to "white" schools as applications for "transfer" under the Tennessee Pupil Assignment Law (Tennessee Code Annotated, 1955, Section 49-1741, et seq.), and of

the many such applications it has received, it has permitted only four additional Negro school children to be enrolled in its said "white" schools as of the current date. No white school children in the City of Jackson or County of Madison are or have ever been enrolled in any of the "Negro" schools of said City or County, and the schools of both of said school systems continue to be operated by defendants on the basis of "white schools" for white children and "Negro schools" for Negro children.

In June, 1962, the infant plaintiff, Brenda Kay Monroe, through her parents, made written application to the defendant, City Board of Education, to be admitted to Jackson Senior High School, a "white" school operated by said defendant, for the school year 1962-63 beginning in August, 1962. In July, 1962, the infant plaintiff, Harold Dwayne Walker, made application to said defendant, City Board of Education, to be admitted to the Alexander Elementary School, a "white" school operated by said defendant, for the 1962-63 school year beginning in August, 1962. Said infant pursued the administrative remedies provided under the Tennessee Pupil Assignment Law, but their said applications were denied by defendants solely on account of their race or color.

Plaintiffs aver that the aforesaid action, or any other action of defendants in attempting to adopt or apply the Tennessee Pupil Assignment Law as a plan of desegregation, is invalid and does not comply with the requirement of the Fourteenth Amendment to the Constitution of the United States in that said law is not and does not purport to be a plan of desegregation, and is inadequate

as a plan for reorganizing the public schools into a nonracial system; nor does said law afford an adequate administrative remedy for plaintiffs, in view of defendants' continuing policy, practice, custom and usage of racial segregation and their failure and refusal to reorganize said school systems on a nonracial basis.

11. At the beginning of the school terms, i.e., to-wit: In August, 1962, the infant plaintiff, Brenda Kay Monroe, presented herself with her father and made proper and timely application for admission to said Jackson Senior High School, but was denied admission to said school by defendants, solely on account of her race or color. On the same day, the infant plaintiffs, Harold Dwayne Walker and Georgia Stephanie Springfield, presented themselves together with some of their parents and made proper and timely applications for admission to the Alexander Elementary School. Both of said plaintiffs were refused and denied admission by defendants to the said Alexander Elementary School, solely on account of plaintiffs' race or color. All of said infant plaintiffs reside in close proximity to the respective schools to which they applied and would have been admitted had they been white children. The plaintiffs, Brenda Kay Monroe and Harold Dwayne Walker, live much nearer to said schools to which they applied than to the "Negro" schools which they are and have been required by the defendants to attend. The infant plaintiff, Georgia Stephanie Springfield, had not attended school in the past, but was entering the first grade, and lives much nearer to Alexander Elementary School than to the "Negro" school which defendant, City

Board, requires her to attend. The plaintiffs, Kenneth A. Martin and wife, Eva N. Martin, and their child, the infant plaintiff, Maria Bonita Martin, are presently residing near a school designated by the defendants as a "Negro" school; however, they join in this action for the reason that said infant plaintiff, Maria Bonita Martin, as well as other persons similarly situated, are being denied their rights to enjoy a non-discriminatory public education by reason of the compulsory racially segregated public school systems which the defendants are maintaining and operating in and for the City of Jackson and County of Madison, State of Tennessee, as more fully shown hereinafter.

(a) Defendants' requirement of compulsory racial segregation imposes unreasonable burdens upon the infant plaintiffs and other Negro school children similarly situated who live near schools which white children living in the same area are permitted to attend, but plaintiffs and all other Negro children are refused assignment to these "white" schools and required to travel greater distances to "Negro" schools, solely because of their race or color.

(b) Plaintiffs aver that while some of them sought and seek admission of their children to the respective schools to which they applied as aforesaid, same being the schools of their choice and nearer to their homes, all of the plaintiffs further insist that the operation of said compulsory racially segregated school systems in the City of Jackson and in the County of Madison violates rights of the plaintiffs and members of their class which are secured to them by the Due Process and Equal Pro-

tection Clauses of the Fourteenth Amendment to the Federal Constitution. The compulsory racially segregated school system is predicated on the theory that Negroes are inherently inferior to white persons and, consequently, may not attend the same public schools attended by white children, who are superior. The plaintiffs, and members of their class, are injured by the policy of assigning teachers, principals and other school personnel on the basis of the race and color of the children attending a particular school and the race and color of the person to be assigned. Assignment of school personnel on the basis of race and color is also predicated on the theory that Negro teachers, Negro principals and other Negro school personnel are inferior to white teachers, principals and other white school personnel and, therefore, may not teach or serve white children. Thus all of the plaintiffs are affected and injured by defendants' aforesaid policy, practice, custom or usage, whether they are thereby excluded from a white school nearer their homes or whether, on the other hand, they are required to attend a school nearer their homes but which is designated and stigmatized as a "Negro" school, from which all children of other racial extractions are excluded.

(c) Plaintiffs further aver that, while the "white" schools owned, maintained and operated by the defendants, City Board of Education and County Board of Education, are in general, modern, well-equipped and well-staffed, with adequate facilities of all kinds and with broad, up-to-date curricula, textbooks and programs designed to afford their students a good education, plaintiffs are in-

formed and believe, and aver upon said information and belief, that most of the "Negro" schools in both of said school systems, including the "Negro" City schools which the infant plaintiffs have been attending, are substandard, under or inadequately staffed, and poorly equipped, with lacking or inadequate library, cafeteria and health facilities, and with inadequate or outdated academic facilities, textbooks and other training aids which are frequently handed down to them after being discarded in the "primary" systems of "white" schools operated by defendants. Said City and County School Systems are closely related and interdependent insofar as the rights which plaintiffs here seek to redress are concerned, as illustrated by the fact that all school children residing in the City of Jackson may apply and be admitted freely to the schools operated by said County Board of Education, except that said County Board likewise enforces racial segregation in said County Schools, limiting admission of Negro children to "Negro schools" therein. In addition, administrative transfers have been rather freely permitted by defendants Boards of Education between said City and County Schools Systems, so long as this could be done without affecting said defendants' mutual policies and practices of racial segregation in the two school systems. Said County Board of Education operates the only High School in Madison County offering certain technical or vocational courses vital to adequate preparation of children with aptitudes for science and technology in a modern age, and "white" children residing in the City of Jackson as well as the County of Madison are freely admitted

to this as well as other County "white" schools, but Negro school children of both the City and County are denied this right, but are permitted by defendants to attend only the "Negro" County Schools. Said County Schools are supported by public funds partially obtained through taxation of residents of the City of Jackson, including the plaintiffs and other members of their class.

12. The defendants apparently rely on the following provisions of the Tennessee Constitution and Statutes, which read as follows:

Constitution of 1870, Art. 11, Sec. 12:

". . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school . . . ."

Tennessee Code, 1955, Sections:

"49-3701. Interracial Schools prohibited. — It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning.

"49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement.

"49-3703. Penalty for violations. — Any person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisoment not less than thirty (30) days nor more than six (6) months."

13. The infant plaintiffs and all other persons similarly situated, in the City of Jackson and County of Madison, State of Tennessee, are thereby deprived of their rights guaranteed by the Constitution and laws of the United States.

Plaintiffs aver that the said constitutional and statutory provisions and all other laws, customs, policies, practices and usages of the State of Tennessee requiring or permitting segregation of the races in public education, fall within the prohibited group which the Supreme Court of the United States holds must yield to the Fourteenth Amendment of the Constitution of the United States, and are of no force and effect.

Plaintiffs therefore aver that the said custom, policy, practice or usage of defendants in excluding plaintiffs and other persons, similarly situated, from public schools owned, maintained and operated by the defendants, City Board of Education and County Board of Education, in the City of Jackson and County of Madison, State of Tennessee, solely because of plaintiffs' race or color, and in operating said compulsory racially segregated public school system in and for said City and County, pursuant to said constitutional and statutory provisions and any other law, custom, policy, practice or usage of the State

Tennessee requiring or permitting segregation of the Negro and white races in public education, deprives plaintiffs and all others similarly situated of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and is therefore unconstitutional and void and affords defendants no legal excuse to deprive plaintiffs of their rights herein prayed.

14. Plaintiffs and those similarly situated and affected, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of, other than this suit for a declaration of rights and an injunction. Any other remedy to which plaintiffs and those similarly situated, could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience, not only to the plaintiffs and those similarly situated, but to defendants as governmental agencies.

Plaintiffs are informed and believe, and aver upon said information and belief, that although classes for the Spring Semester, 1963 begin in the Negro schools of said City and County on or about 14 January 1963, similar classes in the "white" schools of said City and County do not begin until 21 January 1963. As aforesaid, plaintiffs requested admission to the public schools of said

City and County on a racially nondiscriminatory basis several months ago, and both defendants, City and County Boards of Education, are or should have been aware for many years of their duty to initiate and make known to school patrons a plan or plans for desegregation of said school systems. Notwithstanding their knowledge of this duty, they have not done so, and there is no reason why, in view of the foregoing circumstances, the said infant plaintiffs and other Negro children, similarly situated, should not be admitted to the public schools of said City and County on a nondiscriminatory basis at once. The infant plaintiff, Georgia Stephanie Springfield, entered public school for the first time in August, 1962 and theretofore had not been subjected to the inherent evil of racially segregated education. Plaintiffs further aver that they and other Negro school children, similarly situated, will suffer irreparable injury in the future unless defendants are restrained by the temporary restraining order and injunction of this Court for the reasons set out hereinabove, and also for the reason that the defendants very apparently intend to continue their said policies and practices of compulsory racial segregation; and if the plaintiffs and other Negro children similarly situated, are not granted immediate relief now, they will continue to be subjected to the inherent evil and inequality of said racial segregation in the public schools for an indefinite period of time, resulting in immediate and lasting harm and damage not only to them, but also to white children who are thereby being indoctrinated daily with concepts of themselves as a master or superior race, while infant

plaintiffs will continue to be subjected daily to the said indoctrination classifying them as an inferior race.

15. There is between the parties an actual controversy as hereinbefore set forth.

WHEREFORE, PLAINTIFFS respectfully pray:

The Court issue forthwith a temporary restraining order and or a preliminary injunction against the defendants, immediately restraining and enjoining them and each of them, their agents, employees, servants or attorneys from refusing to admit the infant plaintiffs and other persons similarly situated, to the Jackson Senior High School and Alexander Elementary School, or any other public school, institution or facility operated by defendant, City Board of Education, or by defendant, County Board of Education, in and for the City of Jackson and County of Madison, State of Tennessee, because of plaintiffs' race or color, pending further orders of the Court.

The Court adjudge, decree and declare the rights and legal relations of the parties to the subject matter here in controversy in order that such declaration shall have the force and effect of a final judgment or decree.

The Court enter a judgment or decree declaring that the custom, policy, practice or usage of defendants in maintaining and or operating compulsory racially segregated public school systems in and for the City of Jackson and the County of Madison, State of Tennessee, and in excluding plaintiffs and other persons similarly situated,

from the Jackson Senior High School and Alexander Elementary School, or any other public schools, institutions or facilities maintained and or operated by defendants, City Board of Education and County Board of Education, solely because of race or color, pursuant to the above quoted portions of Article 11, Section 12 of the Constitution of Tennessee, Sections 49-3701, 49-3702 and 49-3703 of the Tennessee Code Annotated, 1955, and any other law, custom, policy, practice and usage, violates the Fourteenth Amendment of the Constitution of the United States, and is therefore unconstitutional and void.

The Court issue a permanent injunction forever restraining and enjoining defendants and each of them, their agents, employees, servants or attorneys, from maintaining and or operating compulsory racially segregated systems of public schools, institutions or facilities for education in and for the City of Jackson and County of Madison, State of Tennessee, and from refusing to admit plaintiffs and other persons similarly situated to said Jackson Senior High School, Alexander Elementary School, or any other public schools, institutions or facilities operated by defendants, City Board of Education and County Board of Education, in and for the said City and County, because of plaintiffs' race or color.

In addition to the immediate and preliminary relief prayed hereinabove in behalf of the named infant plaintiffs and other persons similarly situated, the plaintiffs pray that this Court also expeditiously issue a preliminary and or permanent injunction directing defendants, City and County Boards of Education, either to

recognize immediately, or in the alternative to present to the Court at an early date a complete plan for the prompt and speedy reorganization of the entire systems of public schools, institutions and facilities within their respective jurisdiction and under their control, into unitary, nonracial systems of schools, institutions and facilities, which shall include a plan for the assignment, education and treatment of students or enrollees on a nonracial basis, the assignment and treatment of teachers, principals, staff and other school, institutional, educational or other sustaining personnel on a nonracial basis, the construction and use of all plant or other facilities and the approval of budgets on a nonracial basis, operation of the school transportation system on a nonracial basis, and the elimination of all and any other discriminations in said systems and in the operation and use of schools, institutions, facilities, curricula or programs of any nature whatsoever in said City and County School Systems, which are based upon race or color. Plaintiffs pray that if this Court directs defendants to present such desegregation plans, that this Court will retain jurisdiction of this case pending Court approval and full and complete implementation of defendants' plans.

Plaintiffs further pray that the Court will allow them their costs herein and such further, other or additional

relief as may appear proper to the Court to be equitable and just.

Z. Alexander Looby
Avon N. Williams, Jr.
327 Charlotte Avenue
Nashville 6, Tennessee.

Jack Greenberg
Constance Baker Motley
James M. Nabrit, III
10 Columbus Circle
New York 19, New York

Attorneys for Plaintiffs.

STATE OF TENNESSEE
MADISON COUNTY

William Monroe, Frank Walker, Rolean Walker, Mildred T. Springfield, Kenneth A. Martin, and Eva M. Martin, make oath that they are some of the plaintiffs in the above case, that they have read and know the contents of their foregoing complaint and that the statements made therein are true as of their own knowledge, except as to those statements which are stated therein to be made upon information and belief, and those statements they believe to be true.

SIGNED: William Monroe
Frank Walker
Mrs. Rolean Walker
Mrs. Mildred T. Springfield
Kenneth A. Martin
Mrs. Eva M. Martin

Sworn to and subscribed before me, E. M. Shaw, a Notary Public in and for said State and County, the 8th day of January, 1963.

E. M. SHAW
Notary Public

My Commission Expires: 20 April, 1964.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

CIVIL ACTION No. 1327

BRENDA KAY MONROE, An infant by William Monroe her father and next friend, et al

Plaintiff

vs.

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, ETC. ET AL, COUNTY BOARD OF EDUCATION OF MADISON COUNTY, ETC. ET AL

Defendant

ANSWER

Defendant Taylor Robinson reserving all of his rights under the motions heretofore filed herein and for answer to the complaint, avers:

FIRST DEFENSE

This is an action to reorganize the entire system of public education in the City of Jackson, and in the County of Madison, Tennessee, including the administrative and professional staffs and which would affect each and every child in the two school systems. That, as will appear from the face of the complaint, the only parties represented in these proceedings are the Negro school children resid-

ing in the City of Jackson and Madison County, who appear by virtue of a class action, and the administrative departments of the two school systems involved. That the White School children and the white and Negro School teachers of each of the school systems involved are parties indispensably necessary to a full and final adjudication of this controversy and none of these parties or classes are represented herein. That judgment rendered as prayed for, will conclude the rights of the White school children the White teachers, and the Negro teachers of each of the school systems here involved, without these parties having had an opportunity to defend or protect their interests herein. That hence the court should dismiss the action for failure to join indispensible parties.

1.

Defendant admits the allegations of paragraph 1 of the complaint.

2.

Defendant admits that part of paragraph 2 which sets forth that this is a proceding under title 28 of the United States Code Sections 2201 and 2202 for a judgment declaring the rights and legal relations between plaintiffs and defendants, but denies all other allegations of paragraph 2 except such as are herein specifically admitted.

3.

Defendant admits the allegations contained in paragraph 3 of the compiaint.

4.

Defendant admits the allegations of paragraph 4 of the complaint except that it is specifically denied that plaintiff can satisfy all the requirements for admission to the schools to which they have applied as set forth in their complaint.

5.

Defendant admits the allegations contained in paragraph 5 of the complaint.

6.

Defendant admits the allegations contained in paragraph 6 of the complaint.

7.

Defendant admits the allegations contained in paragraph 7 of the complaint.

8.

Defendant denies allegations of paragraph 8 of the complaint, except as hereinafter specifically admitted.

9.

Defendant denies allegations of paragraph 9 of the complaint except as hereinafter specifically admitted.

10.

Defendant denies allegations of paragraph 10 of the complaint for want of specific knowledge or informa-

tion upon which to form a belief as to the truth of the allegations therein contained.

11.

Defendant denies the allegations contained in paragraph 11 of the complaint.

12.

Defendant avers that allegations of paragraph 12 are mere conclusions of law which require no answer.

13.

Defendant denies allegations contained in paragraph 13 of the complaint.

14.

Defendant denies allegations contained in paragraph 14 of the complaint.

15.

Defendant denies allegations contained in paragraph 15 of the complaint and re-avers that no controversy exists between your said defendants and plaintiffs herein, for the reasons heretofore set forth in the motion to dismiss previously filed herein.

16.

Further answering, defendant shows that this complaint sets forth both an action at law and an action in equity. Insofar as this complaint seeks a declaratory judgment saying that defendants under color of law have

subjected or caused to be subjected the plaintiffs and the class which they represent to deprivation of their rights, privileges, and or their immunities under the Constitution and laws of the United States (42 U.S.C. Sec. 1983), it is an action at law as well as in equity, since it would be res judicata as to defendants liabilities for all damages resulting therefrom. That, hence, defendant desires, and is entitled to, a jury trial on all issues of fact in this cause, all as guaranteed by the 7th amendment to the Constitution of the United States, and rules 38, and 57 of the Federal Rules of Civil Procedure.

WHEREFORE, having fully answered defendant prays:

(1) That the court should dismiss the action for failure to join indispensible parties.

(2) The defendant further prays that a judgment be entered in favor of defendants and against plaintiffs, dismissing this suit at plaintiffs cost.

(3) That, defendant be granted such other general and equitable relief as may be necessary and proper.

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Homer Louisiana

s W. M. Shaw
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 676

TAYLOR ROBINSON,

Petitioner,

—v.—

HONORABLE BAILEY BROWN, Judge, United States District Court for the Western District of Tennessee,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinion Below

The opinion of the Court of Appeals is reported at 320 F. 2d 503.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

In a suit brought under 42 U. S. C. 1983 to desegregate a public school system, in which an injunction and a declaration of rights is sought, is a defendant school board member constitutionally guaranteed a trial by jury?

Statutes Involved

The pertinent statutes are set forth in the Petition.

Statement

This cause stems from a class action instituted in the United States District Court for the Western District of Tennessee, Eastern Division, on January 8, 1963, to desegregate the public schools of the City of Jackson and Madison County, Tennessee. The complaint named as defendants the Board of Commissioners of the City of Jackson and its individual members and the County Board of Education of Madison County and its individual members, one of whom is petitioner.

The complaint prayed for injunctive relief against the racially segregated system of public schools.

The prayer for relief also included the following two paragraphs:

> The Court adjudge, decree and declare the rights and legal relations of the parties to the subject matter here in controversy in order that such declaration shall have the force and effect of a final judgment or decree.
>
> The Court enter a judgment or decree declaring that the custom, policy, practice or usage of defendants in maintaining and/or operating compulsory racially segregated public school systems in and for the City of Jackson and the County of Madison, State of Tennessee, and in excluding plaintiffs and other persons similarly situated, from the Jackson Senior High School and Alexander Elementary School, or any other public schools, institutions or facilities maintained and/or operated by defendants, City Board of Education and County Board of Education, solely because of race

or color, pursuant to the above quoted portions of Article 11, Section 12 of the Constitution of Tennessee, Sections 49-3701, 49-3702 and 49-3703 of the Tennessee Code Annotated, 1955, and any other law, custom, policy, practice and usage, violates the Fourteenth Amendment of the Constitution of the United States, and is therefore unconstitutional and void."

Petitioner answered, demanding, *inter alia*, trial by jury (see Petition 41a-42a). On June 4, 1963, the District Judge, respondent herein, entered an order striking petitioner's demand for jury trial because "all issues in the case are equitable" (Petition, p. 5a). Thereupon petitioner, on June 10, 1963, petitioned the United States Court of Appeals for the Sixth Circuit for a writ of mandamus requiring respondent to vacate and expunge from the record its order of June 4, 1963.

On June 19, 1963, respondent granted plaintiffs' motion for summary judgment in the case, styled *Brenda K. Monroe, et al. v. Board of Commissioners of the City of Jackson, Tennessee, et al.*, Civil Action No. 4527. The two Boards of Education were required to file complete plans for desegregation of the public school system.

On July 31, 1963, the Court of Appeals for the Sixth Circuit dismissed petitioner's petition, agreeing with respondent that the case involved only equitable issues (see Petition, p. 8a).

On September 19, 1963, the Court of Appeals denied petitioner's application for a stay.

ARGUMENT

The Petition Should Be Denied Because the Decision Below—Holding That Petitioner Has No Constitutional Right to a Trial by Jury in a Purely Equitable Suit—Presents No Conflict With the Decisions of This Court and Is Clearly Correct.

The Seventh Amendment to the United States Constitution directs that

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

The common law referred to is the common law of England of 1791.[1] Thus, the Seventh Amendment, preserving the right to trial by jury in actions at law, planted deep in American law the distinction between legal and equitable causes of action. As new rights of action developed, courts characterized them as legal or equitable by analogy to their historical counterparts to decide whether they created rights to a jury trial.[2] The distinction survived the merger of the federal court of law and equity in 1938; the common law forms of action have continued to serve as guideposts in determining what issues in a civil action are historically legal and therefore triable to a jury, and what issues are historically equitable and triable by the court.

Thus, today the conventional test for determining whether a party has a constitutional right to trial by jury

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[1] *Dimick* v. *Schiedt*, 293 U. S. 474, 476; *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 657.

[2] 5 Moore, Federal Practice, §38.11 (7).

continues to be whether he was entitled to have the issue tried by a jury at common law.[3]

So much is recognized by petitioner.[4] Petitioner falls into error, however, in suggesting that legal issues were presented by the case of *Brenda K. Monroe, et al.* v. *Board of Commissioners of the City of Jackson, Tennessee, et al.* That case presented no legal—as distinct from equitable—issues. It was a typical school desegregation case. The prayer of the complaint was only for equitable relief, i.e., an injunction.[5] No money damages were prayed for. The defendants' answers made no legal issues.

Plainly stated, petitioner was not constitutionally guaranteed a jury trial in the *Monroe* case, because *Monroe* was strictly a suit for an injunction and presented no legal issues.

Therefore, the cases relied upon by petitioner are completely inapposite.[6] Those cases involved *legal* issues (e.g., breach of contract, damages for infringement of trademark, treble damages under the anti-trust laws) with claims for money damages, issues traditionally triable to a jury and therefore constitutionally guaranteed a jury trial. The teaching of those cases is simply that a court may not, in a

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[3] See e.g., *United States* v. *Louisiana*, 339 U. S. 699, 5 Moore, Federal Practice, §38.16 (2d ed. 1951).

[4] Petition for Writ of Certiorari, p. 15: "If there were no legal issues involved, then there was no basis for issuance of mandamus."

[5] The complaint sought a temporary restraining order, preliminary injunction and permanent injunction enjoining the defendants from refusing to admit the Negro plaintiffs to public schools on the basis of race and directing the defendants to reorganize the school system on a nonracial basis. See Petition, p. 33a.

[6] *Beacon Theatres* v. *Westover*, 359 U. S. 500; *Dairy Queen* v. *Wood*, 369 U. S. 469; *Simler* v. *Conner*, 372 U. S. 221; *Thermo-Stitch, Inc.* v. *Chemi-Cord Processing Corp.*, 294 F. 2d 486 (5th Cir. 1961).

case where both legal and equitable issues are involved, dispose of the equitable issues in such a manner as to deprive the parties of their right to a trial by jury on the legal issues.

What distinguishes *Beacon Theatres* from the instant case is that there legal issues were blended into the case by the counterclaim.[*] As *Dairy Queen* v. *Wood*, 369 U. S. 469, 472 recognized, the holding in *Beacon Theatres* was applicable only to a case "where both legal and equitable issues are presented in a single case."

Dairy Queen v. *Wood*, 369 U. S. 469, is similarly distinguishable. The Court said: "[T]he sole question which we must decide is whether the action now pending before the District Court contains legal issues" (369 U. S. at 473). The Court answered that question in the affirmative. "[W]e think it plain that [the] claim for a money judgment is a claim wholly legal in its nature" (369 U. S. at 477).

Likewise, in *Simler* v. *Conner*, 372 U. S. 221, the Court said, "On the question whether, as a matter of federal law, the instant action is legal or equitable, we conclude that it is 'legal' in character. . . . The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent

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[*] In *Beacon Theatres* v. *Westover*, 359 U. S. 500, Beacon, a motion picture exhibitor, notified Fox, the plaintiff, that certain Fox exclusive "first run" contracts with movie distributors violated the Sherman Act and threatened to sue for treble damages. Fox sought a declaratory judgment that its contracts were lawful and prayed for an injunction pending final resolution of the litigation to prevent Beacon from bringing an antitrust suit against Fox or its distributors. Beacon answered with a counterclaim for treble damages, demanding a jury trial on the factual issues. The district court viewed the issues raised by the complaint as essentially equitable and ordered a separate trial of these issues before the court without a jury. The Supreme Court held that the district judge abused his discretion in ordering trial of the equitable claim first and ordered that the case be submitted to the jury.

fee contract, a traditionally 'legal' action . . ." (372 U. S. at 223).

Thermo-Stitch, Inc. v. *Chemi-Cord Processing Corp.*, 294 F. 2d 486 (5th Cir. 1961) also involved an action with mixed legal and equitable issues. The Court said:

> The mere presence of an equitable cause furnishes no justification for depriving a party to a *legal action* of his right to jury trial (294 F. 2d at 490-91) (emphasis supplied).

Petitioner does not deny that all the cases relied upon involve legal issues. Rather, petitioner seeks to fabricate a legal issue out of plaintiffs' prayer for a declaration of rights with respect to the equitable issues.* But the inclusion of a claim for declaration of rights as to equitable issues does not, by some mysterious process of judicial alchemy, transmute those issues into legal issues.

The very cases relied upon by petitioner make that clear.

Beacon Theatres teaches that a declaratory judgment action is a neuter remedy, neither legal or equitable, and that a prospective defendant, in an effort to anticipate an action for which a jury would have been proper, may not employ the device of a declaratory judgment action to destroy the other party's right to jury trial. There Mr. Justice Black said:

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*The pleadings in the *Monroe* case (see Petition, p. 3a) make clear that the declaratory relief sought was merely an adjunct to the equitable relief of injunction. The principal remedy, and the only real remedy in the case, was an injunction prohibiting the exclusion of qualified Negro children from public schools and requiring the reorganization of the school systems on a nonracial basis.

> [The Declaratory Judgment Act], while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties. It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox, it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first. 359 U. S. at 504.

Mr. Justice Stewart emphasized the corollary of the above proposition, viz., that if the basic issues in an action for declaratory relief are of a kind traditionally cognizable in equity, then the issues are properly triable by the court.[9]

That the basic nature of the issues presented—whether legal or equitable—controls the question of the right to jury trial, and not the fact that the action is cast in the form of a declaratory judgment action, was reemphasized by the *per curiam* opinion in *Simler* v. *Conner*, 372 U. S. 221. There the Court said:

> The fact that the action is in *form* a declaratory judgment case should not obscure the essentially legal nature of the action. The questions involved are traditional common law issues (372 U. S. at 223) (emphasis supplied).

In short, in this suit for an injunction the issues are purely equitable. These issues become no less equitable by being cast also in the mold of a declaration of rights.[10] To hold otherwise would be to exalt form over substance.

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[9] 359 U. S. at 515.

[10] See *Snubin* v. *United States District Court*, 313 F. 2d 250 (9th Cir. 1963), cert. denied 373 U. S. 936; 5 Moore, Federal Practice, ¶38.29 (2d ed. 1951); Borchard, Declaratory Judgments, pp. 238-239, 399-404 (2d ed. 1941); *Beaunit Mills, Inc.* v.

Since petitioner is unable to identify any legal issues in the present suit, he points to legal issues which *could* arise if plaintiffs sought damages in this or a later suit. Such a claim here is at best premature.[11] To grant it would be to destroy the constitutional principle that there is no right to jury trial in a purely equitable action, since a hypothetical legal issue arising in the future can always be postulated.

Therefore, petitioner's claim that he has a present right to a jury trial because hypothetical issues may arise in the future must fail.

Eday Fabric Sales Corp., 124 F. 2d 563 (2d Cir. 1942); *Inland Steel Products Co. v. MPH Manufacturing Corp.*, 25 F. R. D. 238 (N. D. Ill. 1959); *State Farm Mutual Automobile Ins. Co. v. Mossey*, 195 F. 2d 56 (7th Cir. 1952), cert. denied 344 U. S. 869.

[11] More probably, the claim is totally ungrounded. If the District Court granted precisely the declaration requested in the complaint, namely the declaration that the maintenance of school segregation is unconstitutional, it would afford no basis for a later finding that petitioner, as an individual, had subjected the plaintiffs to the deprivation of their constitutional rights in violation of 42 U. S. C. §1983.

Petitioner seems to agree (Petition, p. 15):

> As was pointed out to the Court of Appeals, it might well be that the two Boards, as legal entities, had violated plaintiffs' civil rights. However, this would not mean that each individual member of each Board had done so. Certainly, any member less than a majority might be completely innocent of a Board action taken by the majority. As was pointed out in the District Court, there is not one shred of evidence, not one admission, not one witness' testimony, which would establish that applicant, Taylor Robinson, has been guilty of any of the acts complained of.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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